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IN THE

Supreme Court of the United States

OCTOBER TERM 1954.

No. 662

ATLANTIC COAST LINE RAILROAD COMPANY,
a corporation,

Petitioner,

v.

H. D. CHANCEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

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H. D. CHANCEY,

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Florida entered in the above entitled case on December 21, 1954.

Citation to Opinion Below.

The opinion of the Supreme Court of Florida, printed in Appendix A hereto, *infra*, p. 7, is reported in 76 So. 2d 871.

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U. S. Code, §1257(3), this petition presenting a claim of right under the Federal Employers' Liability Act, 45 U. S. Code, §51.

The judgment of the Florida Supreme Court was entered on December 21, 1954 (R. 113; p. 7, *infra*). Rehearing was denied, without opinion, January 27, 1955 (R. 123).

Question Presented.

An employee of an interstate railroad employer covered by the Federal Employers' Liability Act (45 U. S. Code, §51) suffered injury while engaged in his employment on premises of an industry not under the railroad's management or control. Such injury was caused solely by a dangerous condition on the premises which arose suddenly, unexpectedly and without precedent.

The question is: "Was the railroad bound to warn the employee of such dangerous condition?"

Statute Involved.

The statutory provisions involved are those of Sec. 1 of Chapter 149 of the Act of Apr. 22, 1908, 35 Stat. 65, as amended by Sec. 1 of Chapter 685 of the Act of Aug. 11, 1939, 53 Stat. 1404, 45 U. S. Code, §51. The statute is printed in Appendix B, *infra*, p. 12.

Statement of the Case.

Mr. Chancey was a member of a switching crew of three employed by petitioner, engaged at the time of his injury in switching freight cars from the plant of Wilson & Toomer Fertilizer Company at Jacksonville, Florida. The switching crew consisted of Mr. Chancey, a fellow crewman, Lee, and the foreman, or conductor, by the name of Smith. Only Smith stood in the relation of a vice principal to the railroad company, and at the time of Chancey's injury, Smith was

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not present, being instead "writing up the bills . . . and getting his paper work straightened out . . . in the office building of the Wilson & Toomer Fertilizer Company" (R. 38, 39), and had been for about three minutes after Lee and Chancey parted from him (R. 53). Chancey was the "lead switchman"; he was senior to Lee, and did "the majority of the work" (R. 33). Lee's sole duties were "passing signals, and assisting Mr. Chancey" (R. 33, 34); and, as the Florida Court's opinion says, (R. 109), Lee was Chancey's "fellow crewman"—merely that and nothing more.

A few short minutes before Chancey's injury, he and Lee entered upon the loading platform of Wilson & Toomer Fertilizer Company. Lee waited on the platform while Chancey went into a box car alongside the platform for the purpose of determining whether the car was ready to be moved. He entered by means of a steel gangplank which had been placed from the platform into the car door, not by Coast Line employees, but by employees of the Fertilizer Company. It was the duty of those employees, not of the railroad employees, to secure the gangplank for safety "as they had done over a period of years", as the Florida Court said (R. 110). While Chancey was in the car, Lee noticed that the gangplank was not secure. He so informed an employee of the Fertilizer Company's who was about to enter the car with a hand truck, but did not say anything to Chancey. Before the Fertilizer Company employee could secure the gangplank, Chancey came out of the car, stepped upon the gangplank, fell to the ground, and was seriously injured.

Such dangerous condition of such a gangplank under similar, or any, conditions had never been encountered before (R. 46, 53, testimony of Chancey's witness, Lee); and not during the experience of "several hundred times during

the course of ten or fifteen years", says Chancey himself at pages 60 and 72.

The Florida Supreme Court affirmed a judgment which Chancey recovered against the Atlantic Coast Line, upon the sole ground that it was for the jury alone to say whether Lee, Chancey's fellow servant, and no representative of the railroad, "acted as a reasonable and prudent person under the circumstances . . . in not warning the plaintiff [Chancey] of the danger". The Florida court apparently took it as of course that if Lee were negligent his negligence would be imputable to the railroad.

The question sought to be reviewed was presented to the trial court by the railroad company's motion for directed verdict made at the close of all the evidence upon the ground that "there has been no showing of any negligence on the part of the defendant" (R. 90). It was presented again to the trial court in petitioner's motion for a new trial, one ground of which urged, "The record contains no showing of any negligence on the part of the defendant" (R. 98). It was presented to the Florida Supreme Court by an assignment of error in the same words (R. 102).

Reasons for Granting the Writ.

The Florida court thus has decided a Federal question of substance not theretofore determined by this Court, and that court has decided the question in a way probably not in accord with any decision of any court.

The Florida court's judgment and opinion extends beyond any known limit a railroad's liability for failure to warn of a dangerous condition, and makes the railroad in this case an insurer of Chancey's safety although this Court has plainly said that it is not the effect of the Federal Employers' Liability Act to make a railroad an insurer.

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The Florida court's opinion is supported by no case or text book that we have been able to find, and it is genuinely believed that there is no such support for the opinion. On the contrary, every opinion of every court that we have found is directly to the contrary of the views of the Florida court.

The railroad company had no knowledge of the dangerous condition. Knowledge of the condition could not be imputed to the railroad. Such a thing had never happened before and the premises were not under the general supervision of the railroad. Chancey's fellow servant, Lee, owed no duty to give Chancey a warning, even as between fellow servants, and certainly he owed Chancey no such duty which is imputable to their employer, the railroad company. Some of the many authorities which we think would cause a reversal of the Florida Supreme Court's judgment are the following:

Aqua System v. *Kodakoski,* 88 F. 2d 395, 398 (5th Cir. 1937);

Madison v. *Phillips Petroleum Co.,* 88 F. 2d 515, 518 (5th Cir. 1937);

Atchison, T. & S. F. Ry. Co. v. *Wyer,* 8 F. 2d 30, 31 (8th Cir. 1925);

Galicich v. *Oregon Short Line R. Co.,* 87 P. 2d 27, 33 (Wyo. 1939);

Walsh v. *Turner Center Dairying Ass'n.,* 111 N. E. 889, 890 (Mass. 1916);

Scano v. *Turner & Blanchard,* 204 N. Y. Supp. 372, 377 (N. Y. Sup. Ct. App. Div. 1924);

Schilling v. *Delaware & H. R. Corpn.,* 114 F. 2d, 69, 71 (2d Cir. 1940—per Chase, J.);

Burdick's Law of Torts (4th Ed.) § 167;

Labatt's Master and Servant (2d Ed.) §§ 241, 1142, 1143;

3 Labatt, Master and Servant (2d Ed.) § 1051, p. 2769;

Restatement of Torts, § 314, p. 854 (and particularly illustration 1).

Conclusion.

For these reasons, the issuance of a writ of certiorari herein is prayed.

Respectfully submitted,

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Appendix A.

Opinion, Supreme Court of Florida.

IN THE SUPREME COURT OF FLORIDA

JUNE TERM, A. D. 1954

SPECIAL DIVISION A.

ATLANTIC COAST LINE RAILROAD COMPANY, a corporation,
Appellant,
vs.
H. D. CHANCEY,
Appellee.

Case No. 25,611.

Opinion filed December 21, 1954.

An Appeal from the Circuit Court for Duval County, Claude Ogilvie, Judge.

HOWELL & HOWELL, for Appellant.

BEDELL & BEDELL, for Appellee.

BIRD, Associate Justice:

The appellee was plaintiff in the Circuit Court of Duval County and recovered a judgment against the appellant therein. He was the lead switchman on the switching crew No. 2 of the Atlantic Coast Line Railroad Company. His duties consisted of switching the industrial tracks of Wilson & Toomer Fertilizer Company.

Shortly after dark on February 12, 1952, the appellee and a fellow crewman, Lee, in line of duty, entered upon the loading platform of Wilson & Toomer Company. Lee

waited on the platform while Chancey, the appellee, entered the box car then being unloaded by employees of Wilson & Toomer Company. He entered the car for the purpose of ascertaining whether the car was ready to be moved, and entered by way of a steel gangplank which had been placed upon the platform, slanting upward into the door of the car, by the employees of Wilson & Toomer Fertilizer Company. It was the duty of said employees of the fertilizer company to nail or secure the gangplank for safety as they had done over a period of years.

While Chancey was in the car making his inspection his co-worker, Lee, noticed that the gangplank was not secure. Lee notified the employee of Wilson & Toomer Company, who was about to enter the car with a hand truck, of the insecure condition of the plank and told him to fix it. Before the man could secure it, the plaintiff who had completed his inspection, came out of the car, stepped upon the insecure gangplank and fell between the car and the platform, receiving injuries for which he sued both the Atlantic Coast Line Railroad Company and Wilson & Toomer Fertilizer Company.

After the suit was filed Wilson & Toomer Company paid the plaintiff $12,500.00 for a covenant not to sue and was dismissed and the suit continued against the Railroad Company. It is not contended that this covenant is a release or settlement of plaintiff's claim.

The gangplank and the platform belonged to the Wilson & Toomer Fertilizer Company and the men unloading the car were all its employees and they usually nailed or secured the gangplank. The plaintiff had never, to his knowledge, been over the gangplank when it was not fastened down and he did not know that it was not secure on this occasion. It appears that both he and his co-worker had flash lights at the time.

The action is brought under the Federal Employers' Liability Act; Title 45, U. S. C. A., Sec. 51, the germane part of which reads as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or

Territories, or between any of the States and Territories or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its cars, engines, appliances, machinery, tracks, roadbed, works, boats, wharves, or other equipment."

In the well considered case of *Atlantic Coast Line Railroad Company* vs. *Dixon*, 189 Fed. Rep. 2nd 525, Circuit Judge Strum of the Fifth Circuit, very aptly states:

"The Federal Employers' Liability Act does not make the employer an insurer of the safety of its employees while they are on duty. The Employer is not held to an absolute responsibility for the reasonably safe condition of the place, tools and appliances, but only to the duty of exercising reasonable care to that end, the degree of care being commensurate with the danger reasonably to be anticipated. Baltimore and O. S. W. R. Co. *vs.* Carroll, 280 U. S. 491, 50 S. Ct. 182, 74 L. Ed. 566. The basis of the employers' liability is its negligence, not the mere fact that the injury occurred. Except as otherwise provided in the Act, liability is determined by common law principles which define negligence as lack of the due care in the circumstances, that is, the doing of acts which a reasonably prudent person would not have

done, or the failure to do what a reasonable prudent person would have done in the circumstances, or both."

"The Employers' duty to its employees is to use reasonable care and prudence to the end that the place in which they are required to work, and the appliance with which they work, are reasonably suitable and safe for the purpose, and in the circumstances, in which they are to be used. The test is not whether the tools to be used and the place in which the work is to be performed are absolutely safe, nor whether the employer knew the same to be unsafe, but whether or not the employer has exercised reasonable care and diligence to make them safe."

"It is of course the duty of an employee to exercise reasonable and ordinary care for his own safety. If the employee's negligence was the sole proximate cause of his injury, he cannot recover. If both employer and employee are guilty of negligence, the employee may recover, but his damages will be diminished in proportion to the amount of negligence attributable to the employee".

The evidence shows that the fellow employee, Lee, while standing on the platform noticed the unsafe condition of the gangplank while the plaintiff was in the car. Lee also knew that it would take but a short time for the plaintiff to finish his inspection and be returning over the gangplank and it became a question of fact to be determined by the jury whether he acted as a reasonable and prudent person under the circumstances, taking into consideration the suddenness of the emergency, in not warning the plaintiff of the danger. The time elapsing between the discovery of the dangerous condition and the fall seems to be in some uncertainty. Lee testified that it was "a fraction of a second" and also "approximately a half a minute". Certainly it was of sufficient duration for Lee to notify the employee of Wilson & Toomer Company to fix the gangplank and the jury

might reasonably find that he should have at the same time notified the plaintiff.

We think the question of negligence under the circumstances was for the jury, since reasonable men might well differ. *Loften* vs. *Wilson*, 69 So. 2nd 185. *Tiller* vs. *A. C. L. RR Co.*, 318 U. S. 54.87 L. Ed. 610.

The judgment is therefore affirmed.

TERRELL, Acting Chief Justice, SEBRING and MATHEWS, JJ., Concur.

Appendix B.

The Federal Employers Liability Act.

Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter. Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404. 45 U. S. Code, §51.

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BRIEF FOR RESPONDENT IN OPPOSITION.

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BRIEF FOR RESPONDENT IN OPPOSITION.

This is a simple run of the mill case under the Federal Employers' Liability Act.

The Supreme Court of Florida held that "The time elapsing between the discovery of the dangerous condition" and Chancey's fall "was of sufficient duration for Lee to notify the employee of Wilson & Toomer to fix the gangplank and the jury might reasonably find that he should have at the same time notified the plaintiff"(Petition, pp. 10 and 11). The petition for certiorari does not challenge this holding, but attacks rather a further holding, implicit but not specifically referred to in the Florida court's opinion, that the railroad company is liable for the results of Lee's negligence in failing to warn plaintiff of the dangerous condition of the gangplank.

Pointing out that "The Florida court apparently took it as of course that if Lee were negligent his negligence would be imputable to the railroad" (Petition, p. 4), petitioner asserts as the reason for granting the writ that the Florida court's judgment and opinion holding the railroad company liable for its employee's negligence extends "beyond any known limit" the railroad company's liability for failure to warn of a dangerous condition and that "the Florida court's opinion is supported by no case or textbook" (Petition, pp. 4, 5).

In taking "as of course" that if Lee were negligent, his employer would be liable, the Florida court was correct. For the very terms of the Federal Employers' Liability Act impose liability upon every carrier subject to the act for injury resulting in whole or in part "from the negligence of any of the officers, agents, or employees of such carrier". Section 51, Title 45, U. S. Code. By this language, the Congress "abrogated the common-law rule known as the fellow-servant doctrine by placing the negligence of a coemployee upon the same basis as the negligence of the employer". *Chesapeake & Ohio Ry. Co.* v. *DeAtley,* 241 U. S. 310, 36 S. Ct. 564, 565, 60 L. Ed. 1016; *Jamison* v. *Encarnacion,* 281 U. S. 635, 50 S. Ct. 440, 74 L. Ed. 1082; *Tiller* v. *Atlantic Coast Line R. Co.,* 318 U. S. 54, 62, 63 S. Ct. 444, 448, 87 L. Ed. 610.

The petitioner refers to the railroad company's employee, Lee, as "Chancey's *fellow servant* and no *representative of the railroad*" (Petition, p. 4), and says that "Only Smith (the foreman) stood in the relation of a *vice principal* to the railroad company" (Petition, p. 2). After so defining the relationship existing between the railroad company and its employees in terms of the old common law, petitioner concludes that "Chancey's fellow servant, Lee, owed no duty to give Chancey a warning, even as between

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fellow servants, and certainly he owed Chancey no duty which is imputable to their employer, the railroad company" (Petition, p. 5).

Thus, it is seen that petitioner relies on and seeks to have the Court apply the common law doctrine of fellow servant, although it invokes the court's jurisdiction upon a claim of right under the Federal Employers' Liability Act (Petition, p. 1) which abrogated that common law doctrine.

The circumstance that the premises where Chancey was hurt "were not under the general supervision of the railroad" (Petition, p. 5) is wholly irrelevant to a consideration of the railroad company's liability for the negligence of its employee, Lee, in failing to warn Chancey. Because the negligence found was not in failing to warn of a danger of which the railroad company had only constructive notice, but in failing to warn Chancey of the danger of which Lee, its employee, was actually aware and, with respect to which, Lee had actually warned an employee of Wilson & Toomer Company.

The holding by the Supreme Court of Florida that the railroad company was liable for the negligence of its employee, Lee, although he was, of course, a fellow employee with Chancey, did not depart from, but followed, the settled construction of the Federal Act.

Accordingly, the reasons urged for granting a writ of certiorari are wholly without foundation and the petition for certiorari should be denied.

Respectfully submitted,

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